FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	4
Argument:	
Enforcement actions brought by the government under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 are not "class actions" subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure	7
A. Enforcement actions brought by the EEOC under Section 706(f)(1) are not class actions even though relief may be sought for a discrete group of affected private citizens	8
1. In initiating litigation under Section 706, the Commission acts to promote the public interest in equal employment opportunity and not merely to advance the private interests of affected citizens	8

Argument—Continued

	Page
2. A public agency that Congress has authorized to bring litigation to enforce federal law need not be certified as a "class representative" of the affected members of the public	13
3. The legislative history of the 1972 amendments to Title VII does not indicate that Congress intended Rule 23 to apply to Commission enforcement litigation	26
B. District courts possess ample power under Section 706(g) to ensure procedural fairness to all persons concerned in the Commission's litigation	32
Conclusion	36

CITATIONS

Cases:

	Page
Air Line Stewards and Stewardesses Association v. *American Airlines, Inc.*, 490 F.2d 636	22
Albemarle Paper Co. v. *Moody*, 422 U.S. 405	17
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	34, 36
Atlantis Development Corp. v. *United States*, 379 F.2d 818	35
Blue Bell Boots, Inc. v. *EEOC*, 418 F.2d 355	11
Donaldson v. *Pillsbury Co.*, 554 F.2d 825, cert. denied, 434 U.S. 856	19

Cases—Continued

	Page
Doninger v. *Pacific Northwest Bell, Inc.*, 564 F.2d 1304	34, 35
East Texas Motor Freight v. *Rodriguez*, 431 U.S. 395	22
EEOC v. *Akron National Bank & Trust Co.*, 78 F.R.D. 684	22, 23
EEOC v. *D.H. Holmes Co.*, 556 F.2d 787, cert. denied, 436 U.S. 962	14
EEOC v. *Detroit Edison Co.*, 515 F.2d 301	28
EEOC v. *E.I. duPont de Nemours and Co.*, 516 F.2d 1297	11
EEOC v. *General Electric Co.*, 532 F.2d 359	10-11, 12, 13
EEOC v. *Hearst Corp.*, 553 F.2d 579	13
EEOC v. *Huttig Sash & Door Co.*, 511 F.2d 453	13
EEOC v. *Kimberly-Clark Corp.*, 511 F.2d 1352, cert. denied, 423 U.S. 994	11, 13
EEOC v. *Louisville & Nashville R.R.*, 505 F.2d 610	13
EEOC v. *McLean Trucking Co.*, 525 F.2d 1007	13
EEOC v. *Occidental Life Insurance Co.*, 535 F.2d 533, aff'd, 432 U.S. 355	12
EEOC v. *Pinkerton's, Inc.*, 14 Fair Empl. Prac. Cas. 1431	19
EEOC v. *Raymond Metal Products Co.*, 17 Fair Empl. Prac. Cas. 206	19
EEOC v. *Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53	19
EEOC v. *The Bailey Co.*, 563 F.2d 439, cert. denied, 435 U.S. 915	11
EEOC v. *Whirlpool Corp.*, 80 F.R.D. 10	22

Cases—Continued

	Page
Graniteville Co. v. *EEOC*, 438 F.2d 32	11
Hansberry v. *Lee*, 311 U.S. 32	20
Johnson v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841, cert. denied, 434 U.S. 920	11-12, 13
Katz v. *Carte Blanche Corp.*, 496 F.2d 747, cert. denied, 419 U.S. 885	35
McClain v. *Wagner Electric Corp.*, 550 F.2d 1115	23, 34
NLRB v. *Fant Milling Co.*, 360 U.S. 301	11
NLRB v. *Rutter-Rex Manufacturing Co.*, 396 U.S. 258	16, 17
National Licorice Co. v. *NLRB*, 309 U.S. 350	11
Porter v. *Warner Holding Co.*, 328 U.S. 395	14, 15, 16, 17, 19, 25, 28, 33, 34
Sam Fox Publishing Co. v. *United States*, 366 U.S. 683	14
Trbovich v. *United Mine Workers*, 404 U.S. 528	24
United States v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, cert. denied, 425 U.S. 944	20, 34, 35
United States v. *Chesapeake & Ohio Ry.*, 471 F.2d 582, cert. denied, 411 U.S. 939	28
United States v. *Ironworkers Local 86*, 443 F.2d 544, cert. denied, 404 U.S. 984	28
United States v. *N.L. Industries, Inc.*, 479 F.2d 354	28
United States v. *St. Louis-San Francisco Ry.*, 464 F.2d 301, cert. denied, 409 U.S. 1107	28

Cases—Continued

	Page
United States v. *Trucking Employers, Inc.*, 561 F.2d 313	35
Wetzel v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, cert. denied, 421 U.S. 972	20
Williamson v. *Bethlehem Steel Corp.*, 468 F.2d 1201, cert. denied, 411 U.S. 931	20, 28, 34
Wirtz v. *Jones*, 340 F.2d 901	18

Statutes and rules:

	Page
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*	11
29 U.S.C. 621-634	18
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, *et seq.*:	
Section 706, 42 U.S.C. 2000e-5	*passim*
Section 706(a), 42 U.S.C. 2000e-5 (a)	4, 7, 9
Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1)	*passim*
Section 706(g), 42 U.S.C. 2000e-5 (g)	5, 6, 10, 16, 19, 25, 32, 35
Section 707, 42 U.S.C. 2000e-6	27, 28, 29, 30, 31, 32
Section 707(a), 42 U.S.C. 2000e-6 (a)	27
Equal Pay Act of 1963, 29 U.S.C. 206 (d)	18, 34
Fair Labor Standards Act of 1938, 29 U.S.C. 201, *et seq.*:	
29 U.S.C. 216(c)	34
29 U.S.C. 217	18

Statutes and rules—Continued

	Page
National Labor Relations Act, 29 U.S.C. 151, *et seq.*	11
Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.*	11
15 U.S.C. 16(a)	14
28 U.S.C. 1292(b)	3
42 U.S.C. 1971	18
Federal Rules of Civil Procedure:	
Rule 23	*passim*
Rule 23(a)	21
Rule 23(a)(3)	6, 23
Rule 23(a)(4)	6, 23
Rule 23(b)(2)	20
Rule 23(b)(3)	20
Rule 23(c)(2)	20
Local Rule 23, United States District Court for the Western District of Washington	3

Miscellaneous:

	Page
Comment, *Certification of EEOC Class Suits Under Rule 23*, 46 U. Chi. L. Rev. 690 (1979)	14, 20, 22, 31
118 Cong. Rec. (1972):	
p. 943	30
p. 3810	26
p. 4078	27
p. 4081	30, 31
p. 4082	21, 30, 31
p. 4607	26
p. 4941	5, 9, 10, 16, 24, 25, 29, 32

Miscellaneous—Continued

	Page
p. 7167	8
p. 7168	10
H.R. 7152, 88th Cong., 1st Sess. (1963)	27
Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 1st Sess. (1971)	29
3B *Moore's Federal Practice* (1979)	18, 20, 21, 23
Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC* v. *D.H. Holmes Co.*, 28 Syracuse L. Rev. 741 (1977)	30, 32
S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. (1972)	29
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)	8, 29

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 599 F.2d 322. The report and recommendation of the magistrate (Pet. App. A-25 to A-32), which was approved and adopted by the district court (Pet. App. A-33), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The petition for a writ of certiorari was filed on September 22, 1979, and was granted on December 10, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has authority under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 to seek relief from discriminatory practices affecting a class of individuals without being certified as class representative under Rule 23 of the Federal Rules of Civil Procedure.

STATUTE INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, is reproduced in the Appendix to the petition (Pet. App. A-34 to A-40).

STATEMENT

The Equal Employment Opportunity Commission brought this suit under Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), against General Telephone Company of the Northwest, Inc., its subsidiary, West Coast Telephone Company, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers. The complaint, as amended, alleges that General Telephone and West Coast Telephone discriminate against female employees with respect to their maternity leave policies and assignments to craft jobs and managerial positions (A. 9, 10). The complaint further alleges that the defendant Union participated in those unlawful practices in its representation of General Telephone employees (A. 10). The Commission seeks injunctive relief, as well as back pay for individuals affected by these practices (A. 11).

The allegations in the complaint are based on information obtained by the Commission in the investigation of charges of discrimination filed by four individuals against General Telephone and the union (see Pet. App. A-7). As a result of these investigations, the Commission found reasonable cause to believe that General Telephone was discriminating against female employees in the manner alleged in the complaint (Pet. App. A-7 n.1). After efforts at conciliation proved unsucessful, the Commission instituted this lawsuit.

The district court referred the case to a magistrate for trial (A. 22). On the same date, the Commission moved for an order bifurcating the issue of liability from the issue of individual damages and backpay (A. 12). General Telephone thereafter filed a motion asking the court to dismiss the "class action aspects" of the complaint on the ground that the Commission had not moved for certification as a "class representative" pursuant to Fed. R. Civ. P. 23 within the time limit set by local Rule 23 of the Western District of Washington (A. 24). The magistrate recommended that General Telephone's motion be denied, and the district court adopted the magistrate's recommendation (Pet. App. A-25 to A-32, A-33).

An interlocutory appeal from this ruling was certified pursuant to 28 U.S.C. 1292(b). The court of appeals affirmed the judgment of the district court, holding that the Commission could obtain relief under Section 706 of Title VII for a class of individuals harmed by discrimination without being certified as

a class representative under Rule 23 of the Federal Rules of Civil Procedure (Pet. App. A-1 to A-24). The court of appeals concluded that neither Rule 23 nor Title VII requires class certification of Commission enforcement actions and that, for such lawsuits, the class certification process would be time consuming and costly and would serve no useful purpose (Pet. App. A-12 to A-23).

SUMMARY OF ARGUMENT

The question presented in this case is not, as petitioners argue, whether the Federal Rules of Civil Procedure apply to a "class action" brought by the EEOC under Title VII of the Civil Rights Act of 1964. Rather, the questior in this case is whether an enforcement action under Section 706(f)(1) of the Act filed by the Commission in its own name and pursuant to its authority "to prevent any person from engaging in any unlawful employment practice" (42 U.S.C. 2000e-5(a)) is a "class action" subject to the requirements of Rule 23.

The traditional and correct answer to this question is that a public agency, such as the Commission, that is empowered to bring litigation to enforce federal law is not acting as—and need not be certified as—a "class representative." This is because, even though the government may seek relief that will directly benefit a discrete group of private citizens, suits by the United States and its agencies are brought on behalf of the public to promote the public interest in enforcing the requirements of federal laws. The

legislative history of the 1972 amendments to Title VII, in particular, reflects that Congress authorized the Commission to bring suit under Section 706(f)(1) in order to promote "the overriding public interest in equal employment opportunity * * * through direct Federal enforcement." 118 Cong. Rec. 4941 (1972). Accordingly, courts of appeals have specifically rejected the contention that, in exercising its discretionary enforcement authority under Title VII, the Commission serves merely as a proxy for individual complainants.

As is the case with suits brought by the United States and its agencies to enforce other federal statutes, it is the statute, rather than Rule 23, that authorizes the government to sue in its own behalf and seek comprehensive relief for persons affected by violations of federal law. 42 U.S.C. 2000e-5(f)(1), (g). Furthermore, because absent plaintiffs are not bound by the judgment entered in the Commission's enforcement actions, the procedural protections afforded these parties under Rule 23 are inapposite in the government's litigation.

It is significant, moreover, that the government enforcement suits authorized under Section 706(f)(1) do not fit within the terms of Rule 23 as they are commonly understood. It is, for example, difficult to suggest meaningful criteria under which the Commission would satisfy the threshold requirement of Rule 23 that it be a member of the class that it purportedly represents in enforcement actions under Title VII. Similarly, because the Commission's enforcement responsibilities should be exercised in the

public interest and therefore may not entirely coincide with the interests of particular employee classes, the Commission should not be required to establish that its claims are "typical of the claims * * * of the class" and that it would "adequately protect the interests of the class" within the meaning of Rule 23 (a)(3), (4). To the extent that government actions under Section 706 would fail to satisfy the prerequisites of Rule 23, application of the Rule to limit the scope of EEOC enforcement litigation would frustrate Congress's intent that the Commission serve as the primary enforcement agent under the Act and that comprehensive relief be available in government enforcement actions.

Petitioners argue that Rule 23 should be applied to government enforcement actions under Section 706 in order to provide an early, clear definition to the action and to protect defendants from duplicative litigation and conflicting decrees. But Rule 23 is not a substitute for discovery; if a defendant wishes to determine in more detail the precise contours of the Commission's claims, the discovery procedures of the Federal Rules provide the appropriate means for obtaining that information. And the possibility that separate private and government actions may be brought under Section 706 exists precisely because Congress provided for both public and private remedies under Title VII. Moreover, as the court of appeals emphasized in this case, the risk of duplicative or conflicting litigation can be minimized by the exercise of the district court's equitable powers under Section 706(g).

ARGUMENT

ENFORCEMENT ACTIONS BROUGHT BY THE GOVERNMENT UNDER SECTION 706(f)(1) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ARE NOT "CLASS ACTIONS" SUBJECT TO THE REQUIREMENTS OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioners argue that when the EEOC files an enforcement action under Section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), the Commission "is bound by the Federal Rules of Civil Procedure as is any other litigant" (Br. 6). Petitioners therefore claim that, if the Commission seeks to bring a "class action" under Section 706(f)(1), the class certification requirements of Rule 23 must first be satisfied.[1] Although these propositions are essentially unobjectionable, they do not answer the question that this case presents.

The question here is *not* whether the Federal Rules of Civil Procedure apply to a "class action" brought by the Commission under Title VII; rather, the question in this case is whether an enforcement action under Section 706 that is brought by the Commission in its own name (A. 2, 7) and pursuant to its authority "to prevent any person from engaging in any unlawful employment practice" (42 U.S.C. 2000e-5(a)) is a "class action" subject to the requirements of Rule 23. We will show that the traditional and correct answer to this question is that a government enforcement action is not a "class ac-

[1] These requirements are discussed at pages 20-25, *infra*.

tion" under Rule 23 even when (as here) the action seeks relief that will directly benefit a discrete group of affected private citizens. We will further show that this result is consistent with the language and history of Title VII and does not frustrate the objectives that Rule 23 is designed to accomplish.

A. Enforcement Actions Brought By The EEOC Under Section 706(f)(1) Are Not Class Actions Even Though Relief May Be Sought For A Discrete Group Of Affected Private Citizens

1. *In initiating litigation under Section 706, the Commission acts to promote the public interest in equal employment opportunity and not merely to advance the private interests of affected citizens*

Prior to 1972, the Commission's responsibilities under Title VII had been limited by Congress to the investigation and conciliation of private complaints. In 1972, however, in order to provide "the Commission with effective power to enforce title VII" (S. Rep. No. 92-415, 92d Cong., 1st Sess. 28 (1971)),[2]

[2] The initial Senate Report on the 1972 amendments noted that the "failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of title VII." S. Rep. No. 92-415, *supra*, at 4. The Senate version of the amendments proposed that the Commission be given administrative authority to issue cease and desist orders in adjudicative proceedings. *Id.* at 1. The bill ultimately adopted in Conference and enacted by Congress provides for court enforcement in suits filed either by private plaintiffs or the Commission or the Attorney General under Section 706. The purpose of the legislation remained that of enhancing federal enforcement capability. See 118 Cong. Rec. 7167 (1972).

Congress amended Section 706 of the Civil Rights Act of 1964 to authorize the Commission "to prevent any person from engaging in any unlawful employment practice [in violation of that title]." 42 U.S.C. 2000e-5(a). In particular, Congress added Section 706(f)(1) to Title VII to enable the Commission to bring suit in its own name in federal district court against private employers alleged to have violated the Act. 42 U.S.C. 2000e-5(f)(1). At the same time, Congress granted a parallel authority to the Attorney General to bring suit on behalf of the United States in cases involving employment discrimination by state and local governments, agencies and political subdivisions. *Ibid.* Senator Williams, the sponsor and floor manager of the Senate bill, stated that these amendments were designed to permit the Commission and the Attorney General to achieve "the overriding public interest in equal employment opportunity * * * through direct Federal enforcement." 118 Cong. Rec. 4941 (1972).

An action may be filed by the Commission under Section 706 only after the Commission has received a charge from either a private individual or a Commissioner alleging that an employer is engaged in unlawful employment discrimination. 42 U.S.C. 2000e-5(f)(1). After the charge is received, the Commission must determine whether there is reasonable cause to believe the charge is true and, if there is, attempt to eliminate the discrimination (if any) uncovered during the Commission's investigation by conciliation. If the discrimination cannot be elimi-

nated by these informal means, the Commission then determines whether to initiate a civil action in federal court.[3]

In bringing litigation pursuant to Section 706, the Commission (or the Attorney General) acts to advance "the overriding public interest in equal employment opportunity * * *." 118 Cong. Rec. 4941 (1972). Courts are broadly empowered by Section 706(g) to grant equitable relief (such as hiring or reinstatement or restitution in the form of backpay) in favor of employees affected by any unlawful employment practices that are proven as part of the Commission's suit. It is well recognized, however, that the Commission's role is primarily to vindicate the public interest and not simply to advance the private rights of the victims of discrimination. See, *e.g.*, *EEOC* v. *General Electric Co.*, 532 F.2d 359,

[3] The statute provides that the Commission "may" initiate litigation in these circumstances. 42 U.S.C. 2000e-5(f)(1). The Commission thus retains discretion to not file an action when, although reasonable cause may exist to believe that a violation has occurred, litigation is deemed not likely to advance the enforcement objectives of the statute. Congress contemplated that direct federal enforcement, rather than actions brought by private litigants, would become the primary enforcement mechanism for Title VII following the 1972 amendments (118 Cong. Rec. 7168 (1972) (Section-By-Section Analysis of Senators Williams and Javits); Congress also, however, retained the right of private litigants to bring actions under Section 706, so "that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint." 118 Cong. Rec. 7168 (1972).

373 (4th Cir. 1976); *EEOC* v. *E.I. duPont de Nemours and Co.*, 516 F.2d 1297, 1299 (3d Cir. 1975); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1359 (6th Cir.), cert. denied, 423 U.S. 994 (1975).[4] Indeed, the courts of appeals have specifically repudiated the suggestion that, in exercising the litigating responsibility conferred on it in 1972, the Commission serves merely as a proxy for individual complainants under Section 706.[5] For example,[6]

[4] See also *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) ("[T]he Commission may, in the public interest, provide relief which goes beyond the limited interests of the charging parties.")

[5] The fact that a charge by either a Commissioner or a private citizen must precede the filing of a complaint does not distinguish the role of the Commission under Title VII from that of other federal agencies in the enforcement of other federal statutes. The charge-initiated proceedings under Title VII are analogous to proceedings under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*, and the Occupational Safety and Health Act of 1970, 20 U.S.C. 651, *et seq.*, and were patterned after the National Labor Relations Act, 29 U.S.C. 151, *et seq.* See *Graniteville Co.* v. *EEOC*, 438 F.2d 32, 39 (4th Cir. 1971). In *NLRB* v. *Fant Milling Co.*, 360 U.S. 301 (1959), this Court concluded that the NLRB's authority under that Act is not limited to enforcing the claims of named charging parties (*id.* at 307-308):

> To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. * * * The Board was created not to adjudicate private controversies but to advance the public interest * * *."

See also *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 367-369 (1940).

[6] See also *EEOC* v. *The Bailey Co.*, 563 F.2d 439, 454 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978); *Johnson* v.

in *EEOC* v. *General Electric Co., supra,* 532 F.2d at 373, the court stated:

> [T]he standing of the EEOC to sue under Title VII cannot be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights. To hold otherwise * * * would be to continue treating the sole purpose of the Title to be the correction of individual wrongs rather than of public or "societal" wrongs as well as to deny to the EEOC the right to be any more than a mere proxy for the charging party rather than what Congress by the Amendments of 1972 intended, i.e., the public avenger by civil suit of any discrimination uncovered in a valid investigation and subjected to conciliation under the Act.

Because the Commission does not simply stand in the shoes of private complainants in bringing litigation under Section 706, the Commission is not limited in

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Nekoosa-Edwards Paper Co., 558 F.2d 841, 846-847 (8th Cir.), cert. denied, 434 U.S. 920 (1977); *EEOC* v. *Occidental Life Insurance Co.*, 535 F.2d 533, 542 (9th Cir. 1976) ("the EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights"), aff'd, 432 U.S. 355 (1977).

In its decision affirming the judgment of the court of appeals in *EEOC* v. *Occidental Life Insurance Co., supra,* this Court recognized a distinction between government-initiated and private-initiated litigation under Title VII, noting that the Commission may challenge practices not challenged in any private charge by giving "[p]rompt notice of a reasonable-cause determination also serves to cure any deficiencies in the 10-day notice that may result from EEOC amendment of the claimed violation [uncovered] after investigation." 432 U.S. at 372-373 n.32.

a Section 706 suit to the issues raised by the charging party, but may include all forms of discrimination discovered in its investigation of the charge and subjected to its conciliation efforts. *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 846-847 (8th Cir.), cert. denied, 434 U.S. 920 (1977); *EEOC* v. *Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1977); *EEOC* v. *General Electric Co., supra,* 532 F.2d at 366; *EEOC* v. *McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975). Indeed, the Commission may bring a Section 706 suit even though the charging party is no longer entitled to relief if, in the investigation of the charge, the Commission finds reasonable cause to believe that the employer is engaged in unlawful employment practices. See, *e.g.*, *Kimberly-Clark Corp., supra,* 511 F.2d at 1361; *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *EEOC* v. *Louisville & Nashville R.R.*, 505 F.2d 610, 617 (5th Cir. 1974).

2. A public agency that Congress has authorized to bring litigation to enforce federal law need not be certified as a "class representative" of the affected members of the public

A public agency, such as the Commission, that is empowered by Congress to bring litigation to enforce federal law need not be certified as a "class representative" of the members of the public directly affected by the claimed unlawful conduct. Outside the context of Title VII, no court has ever held that a suit by the United States or any of its agencies to enforce federal law must proceed as a class action on

behalf of the affected public.[7] This is so even where the public litigation will—under either common law or statute—operate as a basis for collateral estoppel in subsequent suits brought by private plaintiffs.[8] And this is so even where, as here, the United States or its agencies seek equitable relief, including restitution, for private citizens as part of the remedy in the government action.

For example, in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Administrator of the Office

[7] The Fifth Circuit concluded in *EEOC* v. *D. H. Holmes Co.*, 556 F.2d 787 (1977), cert. denied, 436 U.S. 962 (1978), that the EEOC must be certified as a class representative to obtain relief for persons other than the named charging party in a suit under Section 706. The *Holmes* decision was premised on the court's view that the EEOC's role under Section 706 was merely that of promoting the grievances of individual private employers. 556 F.2d at 794. That conclusion was incorrect for reasons discussed above. The *Holmes* decision has, however, spawned much controversy in the district courts, which have differed sharply on the question that this case presents. These decisions are collected in Comment, *Certification of EEOC Class Suits Under Rule 23*, 46 U. Chi. L. Rev. 690, 691 nn.14, 15 (1979), and in Petitioners' Brief at 9 n.3.

[8] 15 U.S.C. 16(a) provides that any judgment obtained by the United States in contested public criminal or civil litigation under the antitrust laws shall be prima facie evidence of that violation in subsequent private treble damage actions. No court has suggested that the United States must be certified as a class representative in its suits to enforce the antitrust laws. And this is so even though, unlike under 42 U.S.C. 2000e-5(f)(1), private plaintiffs have no right to intervene in the government's antitrust enforcement action. Compare *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688-690 (1961), with Pet. App. A-24. See Comment, *supra*, 46 U. Chi. L. Rev. at 693 n.30.

of Price Administration brought suit in federal district court under Section 205(a) of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 33, to restrain a landlord from collecting rents in excess of the then-applicable federal rent ceiling.[9] The Administrator also sought a decree requiring the landlord "to tender to such persons as are entitled thereto a refund of all amounts collected by defendant from tenants as rent * * * in excess of the [federal rent ceiling] * * *."[10] 328 U.S. at 396-397. This Court held "that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act" was one properly within the jurisdiction of the district court "as an equitable adjunct to an injunction decree" in the Administrator's suit. *Id.* at 398-399. Even though an aggrieved tenant was authorized "to sue for damages in his own

[9] Section 205(a) provided (56 Stat. 33; see 328 U.S. at 397):

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

[10] The Administrator excepted from his request for relief the claims of any tenant who previously had commenced a direct private action against the landlord for the return of excessive rents under Section 205(e) of the Act. 328 U.S. at 397.

behalf" under Section 205(e) of the Act (328 U.S. at 401; see note 10, *supra*), the Court held that restitution of excessive rents to private tenants in the Administrator's suit was authorized under Section 205(a) as an equitable order "necessary to vindicate the public interest, [and] to compel compliance with the Act * * *." 328 U.S. at 402.

The situation here closely parallels that in *Porter* v. *Warner Holding Co.* When the EEOC or the Attorney General exercises their discretion to bring suit under Section 706(f)(1),[11] they do so to promote "the overriding public interest in equal employment opportunity * * * through direct Federal enforcement." 118 Cong. Rec. 4941 (1972). And, as under the Emergency Price Control Act in *Porter*, if a violation is established in the government's suit, the court may exercise its ample equitable power under the Civil Rights Acts to remedy the harm caused by each unlawful practice. See 328 U.S. at 398. Thus, Section 706(g) specifies that, once a violation is found, "the court may enjoin the respondent * * * and order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without backpay * * * or any other equitable relief as the court deems appropriate." *Ibid.* As under the Emergency Price Control Act in *Porter*, and under the National Labor Relations Act in *NLRB* v. *Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969), an equitable award of reparation or

[11] See note 3, *supra*.

backpay to private citizens affected by the illegality is an "order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of [unlawful conduct]." *Id.* at 263.[12] Moreover, it has been recognized in the present case (Pet. App. A-24), as it was in *Porter* (328 U.S. at 403), that the district courts possess inherent equitable power in appropriate cases to notify private parties who may benefit from a reparation or backpay order and to condition any award of relief on the waiver of their independent personal right of action. See also page 35, *infra*.

Petitioners note (Br. 16-17), however, that representative actions by private parties under Section 706 must proceed as class actions under Rule 23. They argue that actions filed by the Commission (and,

[12] Indeed, this Court has specifically recognized that the availability of backpay as a remedy for violations of the Act established in the Commission's suit is an equitable adjunct of the Commission's request for relief that serves primarily a public function as a calatyst for compliance with the Act (cf. *Porter* v. *Warner Holding Co., supra*, 328 U.S. at 402). As this Court explained in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975):

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973).

presumably, the Attorney General) seeking equitable relief for affected employees under Section 706 therefore also must proceed as class actions. But this contention is no more apt under Title VII than it would be in other contexts involving government enforcement litigation that affects the interests of private parties.[13] The private class action is a procedural device that authorizes individuals who have been personally affected by an alleged illegality to serve as the litigation representative of others similarly situated. See, *e.g.*, 3B *Moore's Federal Practice* ¶ 23.02 [1], at 23-35 to 23-44 (1979). Suits brought by the United States and its agencies to enforce federal statutes—including Title VII—stand on a completely different footing. Under Section 706(f)(1), for example, the Commission and the Attorney General have standing not because they have suffered any particularized harm from any conduct but because Congress has granted them authority to enforce this law. The Commission and the Attorney General do not depend

[13] Government actions to prevent statutory or constitutional violations often directly benefit private individuals. Sometimes individuals benefit from injunctive relief (*e.g.*, 42 U.S.C. 1971); often they receive restitution for losses suffered as a result of the violations of law. See the Fair Labor Standards Act of 1938, 29 U.S.C. 217; the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634; the Equal Pay Act of 1963, 29 U.S.C. 206(d). Under such statutes, when the government obtains monetary relief for individuals, it does so not as a mere proxy for those individuals, but under its authority to enforce the law. Such broad-scale relief is available in government actions in large part because of its importance in deterring violations and securing compliance with federal law. See *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965).

on Rule 23 as a source of authority to sue to remedy widespread illegality; rather, Section 706(f)(1) itself authorizes the government's enforcement suit and Section 706(g) authorizes district courts to grant equitable relief, including backpay, for employees affected by any violations established in the government's litigation. Thus, under Section 706(f)(1), as under the Emergency Price Control Act in *Porter*, it is the statute, rather than Rule 23, that empowers the government to sue in its own behalf and seek broad relief for persons affected by proven violation of federal law. See, *e.g.*, *EEOC* v. *Raymond Metal Products Co.*, 17 Fair Empl. Prac. Cas. 206, 207 (D. Md. 1978); *EEOC* v. *Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53, 54 (E.D. Mo. 1978); *EEOC* v. *Pinkerton's, Inc.*, 14 Fair Empl. Prac. Cas. 1431, 1433 (W.D. Pa. 1977).

The historical objectives that the class certification procedure is designed to achieve further indicate that Rule 23 is inapplicable to government enforcement actions under Section 706(f)(1). Under prior practice as well as under the current Rule, a private litigant seeking to proceed on behalf of a class has been required to demonstrate that his "personal interest is sufficiently parallel to the interests of other class members to assure a vigorous representation of the class." *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir.), cert. denied, 434 U.S. 856 (1977). The purpose of this requirement has been to ensure that absent class members—who ordinarily have no choice as to whether to be represented in a private class

suit seeking equitable relief and who will thus be bound without their consent by the result [14]— are not denied due process of law. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); 3B *Moore's Federal Practice*, *supra*, ¶ 23.07[1], at 23-199. As petitioners recognize (Br. 26 n.35), however, absent employees are not bound by the judgment entered in government enforcement actions under Section 706(f)(1). Cf. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 845 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201, 1203-1204 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). The procedural protections afforded to absent plaintiffs under Rule 23 are therefore inapposite in the government's enforcement litigation.[15]

It is significant, moreover, that the government enforcement suits authorized under Section 706(f)(1) simply do not fit the terms of Rule 23 as they are

[14] Private class actions under Title VII almost without exception seek injunctive relief as at least part of the requested relief and are therefore certified under Rule 23(b)(2). Formal notice to class members and an opportunity to opt out of the class action under Rule 23(c)(2) is therefore not required in private Title VII litigation, even though claims for backpay or other restitutionary relief are also included. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.) (notice under Rule 23(c)(2) not required in combined 23(b)(2) and 23(b)(3) class action), cert. denied, 421 U.S. 972 (1975). See Comment, *supra*, 46 U. Chi. L. Rev. at 714 n.139.

[15] The effect of enforcement litigation under Section 706(f)(1) on the defendant's interest in avoiding duplicative litigation and conflicting judgments is discussed at pages 34-36, *infra*.

commonly understood. In the first place, it is not meaningful to think of the Commission (or the United States in suits brought by the Attorney General) as a member of the class that it purportedly represents in actions under Section 706(f)(1). If Rule 23 were applicable to government enforcement litigation, this would, of course, be a threshold requirement.[16] See 3B *Moore's Federal Practice*, *supra*, ¶ 23.04[2], at 23-120 to 23-128.

Petitioners argue (Br. 19-20) that, because Congress intended the Commission to be "a properly suing party" under Section 706 (118 Cong. Rec. 4082 (1972) (Senator Javits)), the Commission should be considered to be a member of the class of affected employees for purposes of Rule 23(a). But, although Congress has given the Commission standing as "a properly suing party" to bring an enforcement action in its own name under Section 706, it does not follow that Congress has made the Commission a member of any employee class. Nor, as petitioners contend (Br. 18-19), does the fact that unions and private associations may, in some circumstances, sue

[16] Fed. R. Civ. P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

as a class representative for their members [17] demonstrate that the EEOC is a class representative in government enforcement litigation. Private membership organizations may represent their members in class actions because the organizations are subject to membership control and supervision and, indeed, ordinarily are chartered to represent the collective interests of their membership as their alter ego.[18] Indeed, they have no other interest in the litigation—unlike the EEOC or the United States which bring suit under Section 706 to vindicate the public interest, and neither of which is composed of, or subject to the control or supervision of, the affected employees who constitute the putative class. Accordingly, the United States and the Commission do not share the characteristics of private associations as alter egos of their members that permit meaningful application of the criteria of Rule 23.[19] See *EEOC* v. *Whirlpool Corp.*, 80 F.R.D. 10, 14 (N.D. Ind. 1978); *EEOC* v. *Akron National Bank & Trust Co.*, 78 F.R.D. 684, 687 (N.D. Ohio 1978).

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[17] See cases collected in Comment, *supra*, 46 U. Chi. L. Rev. at 711-712 nn.119-124.

[18] When private associations contain conflicting membership interests they may lose their ability to serve as class representative for the entire membership. See *Air Line Stewards and Stewardesses Association* v. *American Airlines, Inc.*, 490 F.2d 636, 642 & n.5 (7th Cir. 1973).

[19] In *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403 (1977), the Court stated that a class representative must "'possess the same interest and suffer the same injury' as the class members."

Nor do the Commission's enforcement responsibilities suggest that it should be required to establish that its claims are "typical of the claims * * * of the class" and that it would "adequately protect the interests of the class" within the meaning of Rule 23(a)(3), (4). See note 16, *supra*; *EEOC* v. *Akron National Bank*, *supra*.[20] Because government enforcement actions under Section 706(f)(1) seek to remove the effects of all unlawful discriminatory practices discovered in its investigation of private or Commissioner charges (see page 13, *supra*), the government's claims for relief may not coincide entirely with those of any employee class. In particular, as the court of appeals noted in *McClain* v. *Wagner Electric Corp.*, 550 F.2d 1115 (8th Cir. 1977), the Commission's request for relief may emphasize prospective affirmative action while the class of current employees may desire retroactive relief in the form of backpay (*id.* at 1121-1122):

> [T]he interests of [the EEOC] in filing, prosecuting or settling a § 706 case are not necessarily identical with the interests of individual employees who have been the victims of invidious discrimination in employment. In achieving the broad social and economic objectives of the Act, the Commission may be more concerned with future compliance with the Act by employers than with redressing employee grievances that

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[20] Petitioners also acknowledge (Br. 21) that the numerosity requirement of Rule 23 (see 3B *Moore's Federal Practice*, *supra*, ¶ 23.05[1]) could impede the Commission's ability to obtain relief for small groups of aggrieved individuals.

> have accrued already. And on the other hand, individual employees may well be more interested in being compensated for the wrongs that they may have suffered individually than in future compliance with the Act on the part of employers.

Congress recognized this potential conflict between private interests and the Commission's responsibility to achieve the "overriding public interest in equal employment opportunity" (118 Cong. Rec. 4941 (1972)) by providing that an aggrieved person may intervene as of right in the Commission's enforcement action. 42 U.S.C. 2000e-5(f)(1). If Congress had regarded the Commission as the alter ego, and necessarily adequate representative, of private employee classes, this provision would have been unnecessary.[21]

To the extent that government actions under Section 706 would fail to satisfy the prerequisites of Rule 23, application of the Rule to limit the scope of EEOC enforcement litigation would frustrate Congress's intent that the Commission serve as the pri-

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[21] Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), where this Court held that an aggrieved individual could intervene in a government enforcement action under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(b), because of the possibility that the government might not adequately represent the individual's interest. 404 U.S. at 538-539. It is unnecessary in the present case to consider the extent to which a prospective intervenor's right to participate in a suit by the Commission may be circumscribed by his failure to file a timely charge with the Commission.

mary enforcement agent under the Act and that broad-based equitable relief be available in federal enforcement actions under Section 706(g).[22] If this Court were to conclude that Rule 23 is applicable to government enforcement actions under Section 706(f)(1), the Commission would, of course, attempt to overcome the several analytical barriers to its status as class representative. Otherwise, Congress's intent that the Commission, rather than private litigants, serve as the primary enforcement agent for Title VII would be thwarted. But we submit that the proper course for achieving Congress's clear intent is not to strain or redefine the generally-applicable terms of Rule 23. Instead, the Court should apply to Commission actions under Section 706(f)(1) the traditional rule that an agency litigating in its own name to enforce a federal statute is not suing as a "class representative" even though—in order to "do complete rather than truncated justice" (*Porter* v. *Warner Holding Co.*, *supra*, 328 U.S. at 398)—the federal courts are empowered to grant relief on behalf of a discrete group of the affected public in government enforcement actions.

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[22] In adopting the 1972 amendments to Title VII, Congress intended that "direct Federal enforcement" (118 Cong. Rec. 4941 (1972)), rather than private litigation, would serve as the primary means of achieving compliance. See note 3, *supra*. If the EEOC were disabled from seeking relief under Section 706(g) for all employees affected by an unlawful practice, the congressional scheme would be seriously compromised.

3. *The legislative history of the 1972 amendments to Title VII does not indicate that Congress intended Rule 23 to apply to Commission enforcement litigation*

Nothing in the legislative history suggests that Congress intended Commission enforcement actions under Section 706(f)(1) to be subject to the requirements of Rule 23. Petitioners argue (Br. 13-15) that, because the legislative history does not explicitly demonstrate an intention to "exempt" government enforcement actions from Rule 23, this Court should infer that Congress intended Rule 23 to apply. But, in view of the traditional rule that government enforcement actions are not representative suits, there is no reason why Congress would have thought that the Commission *needed* an exemption from Rule 23 to enable it to sue in its own name to enforce Title VII. Accordingly, legislative silence on this issue would, if anything, support the conclusion that Congress did not intend government enforcement actions under Section 706(f)(1)—any more than government enforcement actions under other statutes—to be subject to Rule 23.[23]

The history of Title VII demonstrates that Congress intended to retain the basic distinction between

[23] Similarly, petitioners err in relying (Br. 12-13) on statements by Senators who supported court enforcement of Title VII because court actions would be subject to "established rules of procedure" (118 Cong. Rec. 3810 (1972) (Sen. Dominick); see *id.* at 4607 (Senator Ervin)), for the rule established by lengthy practice is that government enforcement actions are not representative actions of the type that are subject to Rule 23.

suits by the government, suing in its own right to enforce federal law, and suits by private individuals to obtain relief from unlawful practices. When Title VII was first considered by the House of Representatives in 1964, the House bill provided that enforcement of Title VII would be located in a quasi-judicial administrative agency patterned after the National Labor Relations Board. H.R. 7152, 88th Cong., 1st Sess. (1963). Congress rejected this proposed administrative enforcement scheme, however, and placed enforcement of Title VII in the courts. The bill that Congress enacted established the EEOC as a public investigatory agency with conciliation responsibility and authorized individuals to bring private actions in federal district court. The Attorney General, either on his own or on the recommendation of the EEOC, was empowered under Section 707 of the Act to bring suit if he was satisfied that a "pattern or practice" of discrimination existed. 42 U.S.C. 2000e-6(a). The Attorney General also was authorized to intervene in any private Title VII action brought under Section 706.

Between 1964 and 1972, the United States filed 69 pattern or practice suits under Section 707 of the Act. 118 Cong. Rec. 4078 (1972). In none of the decisions in these cases did any court conclude, or even suggest, that the Attorney General was suing simply as a class "representative" of the persons who were likely to benefit from the litigation. To the contrary, the courts recognized that suits brought by the United States for enforcement purposes were distinct from class actions by private litigants and that judg-

ments in government enforcement actions would not bind private citizens who were not made parties to the action. *E.g.*, *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). And this was so even though, in a number of cases decided prior to 1972, courts had awarded specific relief (such as preferential hiring order and constructive seniority) in pattern-or-practice suits to specific individuals. See, *e.g.*, *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107, 1116 (1973); and *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).[24] No court suggested before the Act was amended in 1972 that the availability of private relief in the government action converted the enforcement suits into "class actions." Any such contention would seem to have been plainly defective in view of this Court's decision in *Porter* v. *Warner Holding Co.*, *supra*. See pages 14-16, *supra*.

When Congress considered alternative means of improving enforcement of Title VII in 1972, it was presumably aware of this history. The purpose of the 1972 amendments was to improve enforcement

[24] In decisions announced since 1972, courts have held that the government may seek awards of backpay for individual employees as proper relief in pattern-or-practice suits under Section 707. See *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314-315 (6th Cir. 1975); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973).

by greatly expanding the government's enforcement role. S. Conf. Rep. No. 92-681, 92d Cong. 2d Sess. 16-17 (1972); 118 Cong. Rec. 4941 (1972). In enacting the amendments, however, Congress again rejected proposals that would have made the EEOC a quasi-adjudicative body empowered to issue cease and desist orders in administrative hearings. Instead, while retaining a private right of action in defined circumstances under Section 706, the amendments authorized the EEOC (with respect to private employers) and the Attorney General (with respect to government employers) to bring government enforcement actions under Title VII and to intervene in any independent private action. 42 U.S.C. 2000e-5(f)(1), 2000e-6. The Commission was authorized to initiate litigation not only in pattern and practice suits under Section 707 but also with respect to all other complaints of discriminatory employment action under Section 706.[25] *Ibid.*

[25] The bill reported out of the Senate committee authorized the EEOC to receive, investigate and conciliate charges against both public and private employers. It also would have authorized the Commission to adjudicate charges against private employers, but not against government employers. If conciliation of any charges against public employers was unsuccessful, the charges were to be referred to the Attorney General for enforcement by civil action. See Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 1st Sess. 381-382 (1971). The Senate Report states that this distinction was adopted to avoid "the needless friction that might be created by a Federal executive agency issuing orders to sovereign states and their localities." S. Rep. No. 92-415, *supra* at 25. At no time was it suggested that the Attorney General would be limited in bringing suits against

The debates on these amendments indicate that, in altering and expanding the government's enforcement role under Title VII, Congress did not intend to limit the government to the status of a "class representative" subject to Rule 23.[26] Rather, Senators Javits and Williams stated that the EEOC's authority to initiate litigation under Section 706(f)(1) would allow it to bring "exactly the same actions that the Department of Justice does under pattern and practice" (118 Cong. Rec. 4081 (1972)), and that "[t]here will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern and practice' charge and those which the Commission will be able to bring as a result of [the] decision to give EEOC court enforcement

public employers to the role of a "class representative" bound by the restrictions of Rule 23.

When the Senate bill was amended to withhold administrative adjudicative authority from the EEOC, the Senate gave the Commission the same prosecutorial power with regard to private employers that it had previously determined to give the Attorney General with respect to public employers. In referring to the difference between the enforcement schemes in the original bill, and the bill adopted, Senator Dominick indicated that the amendment would result in similar treatment of claims by all employees. 118 Cong. Rec. 943 (1972).

[26] Statements in the legislative history indicating that the 1972 amendments were not intended to change "the present use of class action lawsuits under Title VII in conjunction with Rule 23" (118 Cong. Rec. 4081-4082 (1972)) meant only that the amendments were not to alter the prevailing use of class actions under Section 706 by private litigants. Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC* v. *D. H. Holmes Co.*, 28 Syracuse L. Rev. 741, 758 (1977).

powers [under Section 706]" (118 Cong. Rec. 4081 (1972)). As petitioners point out (Br. 14), Senator Javits elaborated by stating that (118 Cong. Rec. 4081-4082 (1972)):

> [If the Commission] proceeds by suit [under Section 706(f)(1)], then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.
>
> * * * * *
>
> I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal courts in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.

In context, it is clear that these remarks were made simply to demonstrate that, because a Commission suit under Section 706 may be just as broad as a pattern and practice suit under Section 707, "the pattern and practice section becomes a redundancy in the law." 118 Cong. Rec. 4081 (1972) (Senator Williams). Senator Javits did not state that the EEOC must be certified as a class representative when it brings an enforcement action seeking broad relief under Section 706; nor did he indicate that he had given specific attention to that question.[27] Rather, he stressed that the government en-

[27] See Comment, *supra*, 46 Chi. L. Rev. at 698. Although this Comment concludes that the legislative history is ambiguous (*ibid.*), it notes that Senator Javits might have "meant that Congress had made the EEOC a properly suing party in class suits without regard to rule 23." *Ibid.*

forcement authority created under Section 706 and Section 707 was essentially the same and should therefore be placed in a single agency. Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC* v. *D. H. Holmes Co.*, 28 Syracuse L. Rev. 741, 753 n.72 (1977).

The legislative history thus contemplates that enforcement actions brought by the Commission under Section 706 would not differ in nature from government enforcement actions under Section 707 or under any other analogous law. When the Commission brings suit under Section 706 to enforce the "overriding public interest in equal employment opportunity" (118 Cong. Rec. 4941 (1972)), it thus should not, under traditional principles, be subject to the representational requirements of a class action under Rule 23.

B. District Courts Possess Ample Power Under Section 706(g) To Ensure Procedural Fairness To All Persons Concerned In The Commission's Litigation

Petitioners claim (Br. 22-28) that Rule 23 should be applied to government enforcement actions under Section 706 in order to achieve essentially two purposes: to provide an early, clear definition to the action and to protect defendants from duplicative litigation and potentially conflicting decrees.[28] The

[28] Petitioners also suggest (Br. 26-27) that class certification would protect employees as well. But, as is discussed in more detail at page 20, *supra*, may intervene in the Commission's action and if they do not choose to do so they are not bound by the judgment in that action (although in some circumstances Title VII's time limitations for filing a charge with the Commission may, as a practical matter, eliminate their alternatives).

court of appeals correctly rejected petitioners' proposed rationale for extending Rule 23 to government enforcement litigation (Pet. App. A-21 to A-24).[29]

The argument that Rule 23 is necessary to define the scope of the government's suit plainly lacks merit. Rule 23 is not a substitute for discovery. If a defendant wishes to determine in more detail the precise contours of the Commission's claim, the discovery procedures of the Federal Rules provide ample, appropriate means for obtaining that information. As in all other civil litigation, responses made during discovery will often be provisional; discovery is intended to shape litigation, not prevent it. But class definition and certification under Rule 23 also is provisional. The definition of a class may be modified at any time before the case is decided on the merits. Fed. R. Civ. P. 23(c)(1). District courts have sufficient means under the discovery rules to ensure that the Commission's claims in an enforcement action are developed in a fair and timely manner.

The principal policy reason advanced by petitioners for extending the certification requirement of Rule 23 to Commission enforcement actions is that it would

[29] Petitioners' proposed reasoning does not distinguish the Commission's Title VII litigation from any other government enforcement action. Their arguments, though incorrect for the reasons discussed in the text, would have been equally applicable in *Porter* v. *Warner Holding Co.* or in other cases involving government litigation affecting the interests of non-party citizens.

avoid duplicative or inconsistent adjudication for defendants. But the possibility that separate private and government actions may be brought under Section 706 exists precisely because Congress provided for both public and private remedies under Title VII. Cf. *Porter* v. *Warner Holding Co.*, *supra*, 328 U.S. at 401-403. It is because of the separate private and public enforcement procedures that courts have held that a private plaintiff other than the charging party named in the complaint (if any) is not bound by the decree in a government enforcement action under Title VII. *Doninger* v. *Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1307 (9th Cir. 1977); *McClain* v. *Wagner Electric Corp.*, *supra*, 550 F.2d at 1122; *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 836-837, 840; *Williamson* v. *Bethlehem Steel Corp.*, *supra*, 468 F.2d at 1203.[30] As this Court pointed out with particular reference to Title VII in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination."

While we agree with petitioner that there is no necessary bar to subsequent suits by individuals after government enforcement actions are completed, as a practical matter such suits are highly unlikely. Moreover, the risk of duplicative litigation can be minimized by the exercise of the district court's equitable powers under Section 706(g).

[30] Thus, in the 1972 amendments to Title VII, although Congress was aware of the provisions of the Equal Pay Act of 1963, 29 U.S.C. 206(d) and the Fair Labor Standards Act of 1938, 29 U.S.C. 216(c), under which litigation by the United States expressly precludes further private litigation, Congress did not adopt similar provisions in Title VII.

In the first place, if the government prevails in its litigation, the district court may include a provision in its decree to condition the receipt of backpay by any individual on the waiver of an his or her personal right of action. *Doninger* v. *Pacific Northwest Bell, Inc.*, *supra*, 564 F.2d at 1309; *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313, 318 (D.C. Cir. 1977); *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 853-862. Because all relief under Title VII is equitable in nature (42 U.S.C. 2000e-5(g)), double recovery for any employee should not be permitted in the court's decree in any subsequent litigation.

If, on the other hand, the employer obtains a favorable judgment in the Commission's action, the *stare decisis* effect of such a decision can be expected to deter any duplicative private litigation. See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 758-760 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974); *Atlantis Development Corp.* v. *United States*, 379 F.2d 818, 828 (5th Cir. 1967).

The danger of conflicting or duplicative litigation under Title VII is thus substantially less than petitioner asserts. As the court of appeals concluded in this case, "courts may fashion appropriate orders to insure that defendants are not subjected to double payment or unnecessarily duplicative litigation. Under their broad equitable powers the courts may

prescribe procedures and remedies which are fair and equitable to all parties" (Pet. App. A-24). Cf. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 n. 21.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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